Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

GUEHENNO LABORDE,

Petitioner,

vs.

U.S. IMMIGRATION AND NATURALIZATION SERVICE;
UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether circumstantial evidence is sufficient for an individual to establish persecution "on account of a political opinion" when the individual has requested political asylum on the grounds of forced recruitment.

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Petitioner Guehenno Laborde respectfully petitions for a writ of certiorari to review the panel decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Fourth Circuit (App. A) is unreported. The opinion of the Board of Immigration Appeals (App. B) is unreported. The opinion of the Immigration Judge (App. C) is unreported. The United States Court of Appeals' denial of Mr. Laborde's petition for rehearing and suggestion for rehearing in banc (App. D) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1998. The Court of Appeals denied Mr. Laborde's petition for rehearing and suggestion for rehearing in banc on July 6, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A), provides:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of

persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT OF THE CASE

A. Factual Background

On December 29, 1993, Guehenno Laborde escaped from Haiti to avoid political persecution from the Front for the Advancement and Progress of Haiti ("FRAPH"). FRAPH emerged in September 1993 as a Duvalierist political/paramilitary organization that sought to amass civilian support to oppose the return of democratically elected President Jean Bertrand Aristide to Haiti in October 1993. App. 3a.

Mr. Laborde was in hiding in Haiti from October through December 1993, after he took a stand against FRAPH by refusing the organization's attempts to recruit him. Mr. Laborde refused to join FRAPH because he was an Aristide supporter and opposed FRAPH's politics. App. 4a (*see* Administrative Record below (A.R.) 243). In Mr. Laborde's opinion, the mission of FRAPH was "to destroy and break everything in Haiti", in accordance with its "ideology to wash out the face of the country." App. 4a.

FRAPH perceived anyone refusing to join them as a political opponent. As testified by Mr. Laborde, "[w]hen they ask you to join their group and you refuse to do so, they [the FRAPH] think of you as a supporter of the legal regime [Aristide]." App. 4a (*see* A.R. 209:5-7).

Mr. William O'Neill, the former Legal Director of the United Nations/Organization of American States International Civilian Mission to Haiti from June 1993 to March 1994, has given an affidavit stating that Mr. Laborde's refusal to join FRAPH:

> is tantamount to expressing a clear political opinion against FRAPH, the Haitian military and all these institutions stand for and brands Mr. Laborde as a supporter of President Jean-Bertrand Aristide.

App. 20a, 25a. Mr. O'Neill's affidavit further explained.

> The climate in Haiti was intense and volatile throughout 1993 and the first nine months of 1994 and it was impossible to be neutral. One was either with the military/FRAPH alliance or seen as an enemy.

App. 25a. In this climate, in October 1993, the FRAPH targeted Mr. Laborde for recruitment as a presumed Aristide supporter because he was an educated young man who lived and worked in Port-au-Prince neighborhoods known to be Aristide strongholds. A contemporaneous United States Department of Justice report confirmed that the military government in power at that time considered students to be pro-Aristide. App. 13a. Furthermore, Mr. Laborde had high visibility because he was popular and worked in the neighborhood store. App. 4a.

The FRAPH first attempted to recruit Mr. Laborde by letter. When Mr. Laborde failed to respond to the letter, two FRAPH members approached Mr. Laborde while he was alone in the store and demanded a response. Mr. Laborde refused recruitment by the FRAPH. App. 4a, 5a.

Thereafter, the FRAPH targeted Mr. Laborde for persecution and/or elimination as a political enemy because he refused recruitment. Within a week, two men, who refused to identify themselves, visited Mr. Laborde's home at 10 o'clock at night looking for him. Mr. Laborde was not home, and at his aunt's insistence, he stayed elsewhere the following night because such visits portended kidnapping and murder in Haiti at that time. The same two men returned to Mr. Laborde's home at approximately 11 o'clock the very next night, again looking for Mr. Laborde. After interrogating the household as to Mr. Laborde's

whereabouts, the two men warned that wherever Mr. Laborde was, they would find him. Mr. Laborde immediately went into hiding after hearing of this second night visit, and stayed in hiding for the next three months until he escaped from Haiti. It was common knowledge that the people who were sought after by the FRAPH were murdered. App. 5a, 18a, 19a, 25a.

Unable to find Mr. Laborde, the intended victim, the FRAPH targeted his family. Although Mr. Laborde's parents and siblings lived three hours travel from Port-au-Prince in the country town of l'Asile, they too were paid a late night visit by individuals demanding to know the whereabouts of Mr. Laborde. These individuals terrorized the family, beating Mr. Laborde's father and 19 year old sister, and ransacking the home. App. 5a, 19a, 25a. The experience of Mr. Laborde's family was consistent with FRAPH activities identified in a U.S. Department of Justice report. App 13a (*see* A.R. 314-15).

In October 1994, the United States and multi-national forces deployed troops to Haiti to ensure its political stability. App. 6a, 27a. Despite the return of President Aristide, and the subsequent election of President Rene Preval, Mr. Laborde continues to fear persecution if he were returned to Haiti. There is documented evidence of FRAPH's intimidation, persecution, murder and mutilation of the corpses of "Returned Haitians" even after the presence of the multinational force ("MNF") and return of President Aristide. The FRAPH and its successor organizations continue to be a threat for a number of reasons, including: (1) the failure of the MNF to disarm the FRAPH and other paramilitary groups; (2) the ineffectiveness of the interim Haitian policy force because of its infiltration by former FRAPH and Haitian Armed Forces members; (3) a lack of effective MNF policing against FRAPH; and (4) a minimal MNF presence in rural areas — such as L'Asile. App. 9a, 28a.

B. Legal Proceedings

Upon Mr. Laborde's arrival at Miami International Airport, the INS charged him with excludability pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(1) of the Immigration and Nationality Act ("INA"). Mr. Laborde appeared for preliminary hearings before an Immigration Judge ("IJ") in Miami. App. 3a. He filed an asylum application on May 10, 1994, before he obtained pro bono counsel through the Lawyers' Committee for Human Rights. Mr. Laborde moved to Silver Spring, Maryland on May 24, 1994 to live with cousins who were in a position to assist him, and his case was transferred to the U.S. Immigration Court in Arlington, Virginia. App. 3a, 17a.

Mr. Laborde first appeared before IJ Joan Churchill in Arlington, Virginia for a master calendar hearing on December 14, 1994. At a hearing on April 14, 1995, Mr. Laborde testified regarding his application for asylum. The INS' case was limited to cross examination by INS District Counsel Debra Todd. On May 8, 1995, the IJ rendered an oral decision denying Mr. Laborde's application. App. 3a, 30a-40a.

Mr. Laborde appealed this denial to the Board of Immigration Appeals ("BIA"). On November 18, 1996, the BIA denied the appeal based on the conclusion that the evidence did not disprove the inference that the FRAPH may have targeted and sought to punish Mr. Laborde merely because it sought to increase its membership or intimidate others into joining. App 24a. The BIA said there was insufficient evidence on the record to conclude that FRAPH's actions subsequent to Mr. Laborde's refusal to join were motivated by a perception that he was a political opponent rather than simply an unwilling recruit. App 25a. The BIA further failed to cite any support, despite a direct contradiction with a U.S. Department of Justice report, for its conclusion that there was no evidence that the

"FRAPH's actions toward the applicant's family were motivated by anything other than a desire to coerce him into joining their organization." App. 25a, 26a; *compare* A.R. 314-15.

There were numerous arguments and record evidence raised on appeal that the BIA did not address, including the applicant's arguments that he suffered past persecution, and fears future persecution as a member of a social group, defined as a subset of draft age young men. The BIA did not address the record evidence concerning the beatings, murder, and mutilation of repatriated Haitians (*see* A.R. 684, 264-66), instead speculating that "there would be little if any continuing interest in him by the FRAPH partisans" if he were repatriated to Haiti. App. 22a, 23a, 28a.

Mr. Laborde filed a petition for review with the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit denied his petition by a decision dated May 6, 1998, on the grounds that the evidence Mr. Laborde submitted of his persecutor's motives was "too general". App. 14a. The Fourth Circuit ruled:

> in the absence of evidence that FRAPH sought to swell its ranks solely with pro-Aristide recruits, the Board drew a permissible inference that FRAPH conducted recruitment efforts without regard to the actual political opinions of a potential individual recruit.

Id. The Fourth Circuit further concluded that for the same reason, the evidence does not compel a finding that FRAPH's subsequent actions against Laborde were on account of his political opinion rather than his unwillingness to join FRAPH. *Id.*

Mr. Laborde filed a petition for rehearing and suggestion for rehearing in banc, which was denied on July 6, 1998. App. 41a, 42a.

REASONS FOR GRANTING THE WRIT

This case presents an important and timely question regarding the type and amount of evidence required for an individual to establish persecution "on account of a political opinion" when the individual has refused forced recruitment. In the wake of the U.S. Supreme Court's decision in *I.N.S. v. Elias-Zacarias*, 502 U.S. 478 (1992) ("*Elias-Zacarias*"), the Ninth and Third Circuits embraced the Supreme Court's ruling that "direct *or* circumstantial evidence" is sufficient to establish persecution "on account of a political opinion". 502 U.S. at 483 (emphasis added). In contrast, the Fourth Circuit's decision in this case sets forth a new and more burdensome evidentiary standard requiring direct evidence that the persecutor targeted only individuals with an inapposite political opinion for forced recruitment. This standard conflicts not only with established Supreme Court precedent and the Ninth and Third Circuits, but also with the evidentiary standard contemplated by international norms and Congress.

I.

THE CIRCUITS ARE IN CONFLICT AS THE TYPE AND AMOUNT OF EVIDENCE REQUIRED TO ESTABLISH PERSECUTION "ON ACCOUNT OF A POLITICAL OPINION" IN FORCED RECRUITMENT CASES.

The decision below sets forth a new and more burdensome evidentiary standard and conflicts with the U.S. Supreme Court's decision in *Elias-Zacarias*, the Ninth Circuit's decision in *Sangha v. I.N.S.*, 103 F.3d 1482 (9th Cir. 1997) ("*Sangha*"), and the Third Circuit's decision in *Balasubramanrim v. I.N.S.*, 143 F.3d 157 (3d Cir. 1998) ("*Balasubramanrim*").

In *Elias-Zacarias*, this Court addressed, as a question of law, whether the respondent's well-founded fear is a fear of persecution "on account of . . . political opinion" within the meaning of § 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42), when the respondent fled the country after refusing forced recruitment by guerrillas. The court determined that a mere refusal to submit to forced recruitment was insufficient to establish a political opinion, because the refusal could be based on such non-political grounds as fear of combat, preference for civilian life and a desire to remain with one's family. 502 U.S. 482-83.

In reaching this decision, however, the Supreme Court said that it "need not decide whether the evidence compels the conclusion that Elias-Zacarias held a political opinion", because Elias Zacarias was unable to establish that he had a well-founded fear that guerrillas would persecute because of that political opinion rather than because of his mere refusal to fight with the guerrillas. *Id.* at 483. In response to Elias Zacarias' objections that he could not be expected to provide direct proof of his persecutor's motives, the majority opinion stated:

> We do not require that. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial.

Id. (emphasis in original). Thus, the Court acknowledged that an applicant for political asylum could, by circumstantial evidence, demonstrate that his persecutors imputed a political opinion to him, and that his political opinion was the impetus for the past or potential future persecution.

In *Sangha*, the Ninth Circuit analyzed the varieties of "political opinion" sufficient to constitute direct or circumstantial evidence of a well-founded fear of persecution

on account of a political opinion in a case involving forced recruitment. Pursuant to *Sangha*, an individual must establish four facts: (1) that he has been a victim of persecution;[1] (2) that he or she holds a political opinion; (3) that this political opinion is known or imputed by the persecutors; and (4) the ensuing persecution of the victim has been or will be on account of this opinion. *Sangha*, 103 F.3d at 1487.

With respect to the second required fact, the Ninth Circuit noted:

> [u]nder our case law, and unchanged by Elias Zacarias, an applicant can establish his political opinion on the basis of his own affirmative political views, his political neutrality [in an environment where neutrality is fraught with hazard], or a political opinion imputed to him by his persecutors.

Sangha, 103 F.3d at 1488-1490. An individual may establish his political opinion by establishing his "hazardous political neutrality" by deliberate actions, including refusing in the face of threats to join guerilla forces. *Id.* at 1488 (citing *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1286 (9th Cir. 1984) (political neutrality must be the product of applicant's conscious, deliberate choice) and *Ramos-Vasquez v. I.N.S.*, 57 F.3d 857, 863 (9th Cir. 1995) (applicant must show that opinion was articulated sufficiently for it to be the basis of persecution)). An applicant may establish an imputed political opinion where

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1. The Fourth Circuit did not reach this fact in its opinion, however, Mr. Laborde has established persecution as defined in *Sangha*: "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive." *Sangha*, 103 F.3d at 1487. The FRAPH threatened Mr. Laborde after he refused recruitment and forced him to go into hiding. In an effort to locate Mr. Laborde, the FRAPH terrorized his family, beating his father and sister. App. 5a, 19a, 25a.

an applicant has refused to join a non-governmental guerrilla group. *Id.* (citing *Alonzo v. I.N.S.*, 915 F.2d 546, 549 (9th Cir. 1990) and *Arteaga v. I.N.S.*, 836 F.2d 1227, 1231 (9th Cir. 1988)).

With respect to establishing the fourth required fact — the "on account of" causation element, the Ninth Circuit followed the Supreme Court's instruction that a refusal to fight is not enough to establish that the persecutor acted "on account of" the refugee's political views, but noted that the Supreme Court left open what type of "direct or circumstantial evidence might suffice to show motivation." *Sangha*, 103 F.3d at 1490. The Ninth Circuit iterated at least four different circumstances which should suffice, including "when there is no other logical reason for the persecution." *Id.* (citing *Nasseri v. Moschorak*, 34 F.3d 723, 729 (9th Cir. 1994) and *Rodriguez-Roman v. I.N.S.*, 98 F.3d 416, 429-30 (9th Cir. 1996)).

The Third Circuit has adopted the Ninth Circuit's opinion in *Sangha*, finding that persecution may be on account of a political opinion that the applicant actually holds or on account of one the foreign government has imputed to him. *Balasubramanrim v. I.N.S.*, 143 F.3d at 165, n. 10 (court remanded to BIA because there was not sufficient evidence on the record to support the adverse credibility determinations upon which the IJ and BIA denied the petition).

The Fourth Circuit's denial of petitioner Mr. Laborde's petition for review is in conflict with the Supreme Court's decision in, and the Ninth and Third Circuit's interpretation of *Elias-Zacarias*.[2]

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2. Additionally, the Fourth Circuit's disregard of *Sangha* in its decision in this case is in conflict with the Fourth Circuit's own opinion in *Cruz-Aguilar v. I.N.S.*, 1998 U.S. App. LEXIS 1891 (4th Cir. January

(Cont'd)

In applying *Elias-Zacarias* to the present case, the Fourth Circuit found that the evidence Mr. Laborde submitted of his persecutor's motives was "too general". It ruled:

> in the absence of evidence that FRAPH sought to swell its ranks solely with pro-Aristide recruits, the Board drew a permissible inference that FRAPH conducted recruitment efforts without regard to the actual political opinions of a potential individual recruit.

App. B at 11. In doing so, the Fourth Circuit sets forth a new and more burdensome evidentiary standard that is inconsistent with the "direct *or* circumstantial" standard recognized by the U.S. Supreme Court in *Elias-Zacarias* and embraced in *Sangha*. The Fourth Circuit requires Mr. Laborde to submit specific evidence of his persecutors' motives in order to avoid any contrary (and unreasonable) inferences to be drawn from circumstantial evidence.

Contrary to the Fourth Circuit, however, and consistent with the Ninth and Third Circuit interpretations' of *Elias-Zacarias*, Mr. Laborde established that he held an affirmative political opinion: "the FRAPH is a subversive group that is ruining my country. I did not want to join a group like that." App. 4a, 5a (*see* A.R. 242-243). Mr. Laborde also established that the FRAPH would have imputed this opinion to him because he was educated young male who lived and worked in Pro-Aristide neighborhoods. App. 9a.

(Cont'd)

27, 1998), and *Misolo v. I.N.S.*, 1998 U.S. App. LEXIS 21521 (4th Cir. September 2, 1998); which relied upon *Sangha* as the legal standard with respect to whether a person was persecuted on account of a political opinion. It is inappropriate for the Fourth Circuit to adopt a sister circuit's precedent in deciding certain Fourth Circuit cases and to reject that precedent in another case. *See John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939) (certiorari granted because of intra circuit conflict and the importance of the question).

Mr. William O'Neill, the legal director of the United Nations/ Organization of American States International Civilian Mission to Haiti from June 1993 to March 1994, affirmed that

> in neighborhoods known for their loyalty to [Aristide] like Carrefour-Feuilles and its environs where Mr. Laborde lived and the Quartier Bolosse where he worked . . . were especially targeted by the military and FRAPH; men of Mr. Laborde's age group were particularly at risk since they were viewed as prime Aristide supporters.

App. 13a.

Under such circumstances, Mr. Laborde's overt refusal to join FRAPH confirmed for the FRAPH that Mr. Laborde possessed an anti-FRAPH political opinion, and caused the FRAPH further to target him for persecution. *Sangha*, 103 F.3d at 1488. This is confirmed by the fact that FRAPH pursued Mr. Laborde after he refused to join, paying two late night visits to his home, and also to his family's home three hours away. App. 5a, 18a, 19a, 25a. As testified by Mr. O'Neill, the FRAPH perceived individuals as being either with the FRAPH or against them, there was no neutral position. App. 25a. Moreover, numerous journalistic and international organization reports consistently describe the FRAPH's *modus operandi* with respect to its perceived political opponents. *See* App. 20a.

Based on such acknowledged facts, a reasonable fact finder could not fail to find there is sufficient circumstantial evidence to establish that the FRAPH imputed a pro-Aristide political opinion to Mr. Laborde, and sought to persecute him on account of his opinion. These facts, and others on the record, permit no other logical conclusion.

This Court should grant Mr. Laborde's petition for certiorari in order to redress the Fourth Circuit's improper institution of a new and more burdensome evidentiary standard, and thereby resolve the conflicts between the circuits. *See Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982) (certiorari granted because ruling below in conflict with Supreme Court precedents); *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO et al. v. Hudson, et al.*, 475 U.S. 292, 300-01 (1986) ("the importance of the case, and the divergent approaches of other courts to the issue, led us to grant certiorari").

II.

THE FOURTH CIRCUIT'S HIGHER EVIDENTIARY STANDARD CONFLICTS WITH THE EVIDENCE REQUIRED BY THE U.S. SUPREME COURT IN *ELIAS-ZACARIAS* AND OTHER COURT OF APPEALS' PRECEDENT.

The Fourth Circuit's opinion requires Mr. Laborde to have presented specific and direct evidence of the FRAPH's motivation in conducting any and all of its forced recruitment. Mr. Laborde had already presented both his and Mr. O'Neill's testimony that the FRAPH, in fact, engaged in a campaign of terror by conducting forced recruitment of young men of Mr. Laborde's age in pro-Aristide neighborhoods. Mr. Laborde also testified that after he refused recruitment, the FRAPH targeted him for late night visits. The actual conduct of the FRAPH, in view of such cumulative evidence of Mr. Laborde's pro-Aristide political opinion, should constitute sufficient circumstantial evidence as to FRAPH's motives.

In contrast, demonstrating that the FRAPH "sought to swell its ranks *solely* with pro-Aristide recruits" requires specific

proof of FRAPH's motives. This Court should reject the Fourth Circuit's institution of a higher evidentiary standard which essentially would require Mr. Laborde to call as witnesses those FRAPH members who sought his membership in Haiti. This has never been the standard for asylum seekers, and it directly conflicts with this Court's holding in *Elias Zacarias*.

Consistent with the "direct or circumstantial" evidentiary standard set forth by the U.S. Supreme Court in *Elias-Zacarias*, numerous circuit cases have indicated that the applicant's own testimony, by itself or supported by general documentary evidence, is sufficient to prove past persecution or a likelihood of future persecution. *See e.g.*, *Maldonado-Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989); *Artiga-Turcios v. INS*, 829 F.2d 720 (9th Cir. 1987); *Canjura-Flores v. INS*, 784 F.2d 885 (9th Cir. 1985); *Bolanos-Hernandez*, 767 F.2d at 1285 ("persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution").

In *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981), the Ninth Circuit specifically rejected a direct evidence standard, overturning the Board's finding that the newspaper articles and family letters submitted by McMullen did not suffice to support his claim of fear of persecution. The Court noted that "[m]embers of the underground [Provisional Irish Republican Army ("PIRA")] obviously would not testify or otherwise make public their intentions," and that "[t]he PIRA's terrorist practices are also likely to discourage testimony from knowledgeable and sympathetic third parties." *McMullen*, 658 F.2d at 1319 (citing the United Nations High Commissioner for Refugees, Handbook on Procedure and Criteria for Determining Refugee Status, ¶ 196, p. 47 (1979) ("the UNHCR Handbook") which notes "that refugees fleeing political persecution are often limited in the evidence they can submit to support their claims").

As stated by Justice Breyer in a First Circuit opinion:

> To offer refuge to those faced with genuine threats of persecution but to forbid them to offer journalistic accounts, expert opinions, and third-party reports in their efforts to prove it would simply "sound the word of promise to the ear but break it to the hope."

Amaneh-Firempong v. INS, 766 F.2d 621, 628 (1st Cir. 1985) (J. Breyer).

To be consistent with Justice Breyer's reasoning, in reviewing Mr. Laborde's case, the Fourth Circuit should have given due weight to the journalistic accounts, third party reports — including reports from the U.S. State Department, and the affidavit testimony of Mr. O'Neill, the U.N.'s Haitian Mission Legal Director. Instead, the Fourth Circuit disregarded this material, and requires Mr. Laborde to disprove all possible adverse inferences to be drawn from the submitted circumstantial evidence. The Fourth Circuit's adoption of a higher evidentiary standard is contrary to all established precedent, and Mr. Laborde's petition for certiorari should be granted in order to remedy this conflict.

III.

THE FOURTH CIRCUIT'S EVIDENTIARY STANDARD CONFLICTS WITH THAT CONTEMPLATED BY INTERNATIONAL NORMS AND CONGRESS.

The international definition of refugee was articulated in the 1951 Refugee Convention relating to the Status of Refugees and its 1967 Protocol, and acceded to by the United States in 1968.[3]

3. Convention relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 150. The terms of the 1951 Convention were subsequently incorporated into the Protocol relating to the Status of Refugees, opened for signature Jan 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

Congressional enactment of the 1980 Refugee Act sought to conform U.S. refugee law to international refugee law.[4] Congress was aware of the UNHCR Handbook when it enacted the 1980 Refugee Act and in all likelihood intended the standards within it to serve as an interpretative guide to the 1980 Refugee Act. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-39 (1987) (Supreme Court identified UNHCR Handbook as a significant source of interpretative guidance).

The Fourth Circuit's adoption of a specific and direct evidence standard for a refugee to demonstrate persecution "on account of political opinion" is inconsistent with these international norms, and, thus, congressional intent. There is no requirement in the law or in international norms that all inferences must be drawn against the applicant. Indeed, the UNHCR Handbook provides that the benefit of the doubt should be given to an applicant, such as Mr. Laborde, who is determined to be credible. UNHCR Handbook, ¶ 203.

In contrast, the Fourth Circuit's opinion establishes a legal evidentiary standard which requires an applicant to either: (i) have specific proof of his persecutors' motives, or (ii) to be able to confirm his persecutors' motives because the applicant actively confronted his persecutor in order to personally deliver the applicant's political sentiment. The INA does not require a refugee to undertake such hazard in order to be eligible for asylum. Indeed, the plain language merely requires a refugee to have a "well-founded fear of persecution on account of . . . a political opinion." 8 U.S.C. §1101(a)(42)(A).

The UNHCR Handbook addresses the issue of difficulty of proof for an asylum applicant:

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4. *See* S. Rep. No. 256, 96 Cong. 2d Sess. 4 (1979), *reprinted* in 1980 U.S.C.C.A.N. 141, 144.

> It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.

UNHCR Handbook, ¶ 196.

Finally, in cases of forced recruitment which involve military groups condemned by the international community, there is clearly a different modicum of evidence required for asylum. The UNHCR Handbook has provided, and the BIA has acknowledged, that a draft age refugee should be considered eligible for asylum when he has been persecuted for refusing to serve in a military whose acts are condemned by the international community as contrary to the basic rules of human conduct. *See M.A. v. I.N.S.*, 899 F.2d 304, 312 (4th Cir. 1990) (citing the UNHCR Handbook ¶¶ 169, 171).

In the present case, the United Nations condemned the activities of the false Haitian Government which FRAPH supported, and deployed multi-national forces to restore Haiti's democracy. The Fourth Circuit's requirement of direct evidence conflicts with *Elias-Zacarias* and the international norms as expressed by the UNHCR. Mr. Laborde's petition for certiorari should be granted in order to address this conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED MAY 6, 1998

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2812

GUEHENNO LABORDE.,

Petitioner,

v.

U.S. IMMIGRATION & NATURALIZATION SERVICE; UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order
of the Board of Immigration Appeals.
(A72-848-808)

Argued: March 5, 1998

Decided: May 6, *1998*

Before WILKINS and HAMILTON, Circuit Judges, and BROADWATER, United States District Judge for the Northern District of West Virginia, sitting by designation.

Petition for review denied and order of board affirmed by unpublished per curiam opinion.

Appendix A

COUNSEL

ARGUED: Kathleen Mary Cronin, ANDERSON, KILL & OLICK, P.C., New York, New York, for Petitioner. Elizabeth A. Welsh, Senior Litigation Counsel, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE', Washington, D.C., for Respondents, ON BRIEF: Linda M. Weinberg, VERNER, LIIPFERT, BERNHARD, MCPHERSON & HAND, CHARTERED, Washington, D.C., for Petitioncr. Frank W. Hunger, Assistant Attorney General, Charles E. Pazar, Senior Litigation Counsel, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Guehenno Laborde (Laborde) petitions for review of a final order of the Board of Immigration Appeals (the Board) denying him political asylurn and withholding of deportation under the Immigration and Nationality Act (the Act), 8 U.S.C.A. §§ 1101-1537 (West 1970 & West Supp. 1998). Because substantial evidence supports the Board's order, we deny the petition for review and affirm the Board's order.

I.

Laborde, a native and citizen of Haiti, was born on February 9, 1969, is single, and has no children. He attended school in

Haiti through the high school level and arrived in the United States on December 30, 1993, carrying fraudulent entry documentation. The Immigration and Naturalization Service (INS) immediately detected the fraudulent nature of Laborde's entry documentation and charged him with being excludable for attempting to enter the United States with fraudulent entry. documentation and for attempting to enter the United States without valid entry documentation. See 8 U.S.C.A. §§ 1182(a)(6)(C)(i), (a)(7)(A)(i)(I) (West Supp. 1998).

Laborde conceded excludability, but applied for asylum and withholding of deportation. His application stated that he had suffered persecution in Haiti on account of his political opinions at the hands of a group known as Front for the Advancenicnt and Progress of Haiti (FRAPH).[1] His application also stated that be fears future persecution in Haiti also at the hands of FRAPH on account of his political opinions.

On April 14, 1995, an immigration judge (IJ) held a hearing on Laborde's application for asylum and withholding of deportation. Before the IJ, Laborde also sought asylum and withholding of deportation because he feared future persecution from FRAPH on account ofhis membership in the following alleged social groups: (1) persons who refused to join FRAPH; (2) educated, Christian young men from a particular neighborhood who were also Aristide supporters; and (3) returning Haitians.

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1. FRAPH is a paramilitary organization, first organized in September 1993 in opposition to the plan for Jean Bertrand Aristide (Aristide) to return as Haiti's President on October 30, 1993. Aristide had been ousted by a military coup in September 1991. The evidence in the record is undisputed that FRAPH's operation consisted mainly of crimes and murders.

Appendix A

Laborde testified at the hearing, with the majority of his testimony focusing on his claim that he feared persecution by FRAPH on account of his pro-Aristide political opinions. Laborde testified that neither he nor his family had actively participated in Haitian politics, but that he voted in favor of Aristide in the 1990 presidential election. Laborde did not present any evidence suggesting that FRAPH knew that he had voted for Aristide.

According to Laborde, he first encountered FRAPH in September or October 1993 when he received a FRAPH recruitment letter at his aunt's store in a Port-au-Prince neighborhood generally considered pro-Aristide. At the time, Laborde managed his aunt's store and lived with her in a different neighborhood also generally considered pro-Aristide.[2] Several other young men in the neighborhood of the store also received the same letter, which explained that FRAPH wanted to create an office in that neighborhood and wanted the support of the youth. Laborde testified that he was afraid after receiving the letter, because according to him, FRAPH's object was to "destroy" and "break everything in Haiti." (A.R. at 179).[3]

Laborde further testified that two weeks after he received the recruitment letter, several members of FRAPH came to his aunt's store for his response. Specifically, the members showed him their FRAPH membership cards and asked if he received

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2. Laborde was twenty-four-years-old at the time. He had lived with his aunt since age fifteen. Prior to living with his aunt, Laborde lived with his parents and siblings in a small town three hours from Port-au-Prince.

3. In this opinion, specific citations to the Administrative Record are introduced by "A.R."

the letter. Laborde answered their inquiry by putting thirty dollars in an envelope and handing it to them. According to Laborde, a donation of money to FRAPH is an indication that one does not want to belong to the group. After this, the members of FRAPH peacefully left the store.

According to Laborde, two weeks later two unknown persons came to his aunt's house asking for him, but he was not there. Laborde suspected they were members of FRAPH, because the same persons came looking for him at his aunt's house the next night, and, upon being advised by his aunt that Laborde no longer lived with her, the unknown persons responded that they would find Laborde.

Laborde testified that these events cumulatively caused him to go into hiding for three months until his parents made arrangements for him to leave Haiti. After leaving Haiti, Laborde learned that members of FRAPH came looking for him at his parents' home. When his father refused to open the door, the members threatened to knock the door down. According to Laborde, the members ransacked the house and pushed around both his father and his sister. Laborde did not offer any testimony or other evidence regarding any other actions by FRAPH with respect to him, but did indicate that he wants to return to Haiti someday, but to return now would put his life in danger.

Laborde admitted at the hearing that neither he nor any member of his family reported any of the incidents that he described to the Haitian authorities. Furthermore, Laborde acknowledged that he has no reason to fear the current Haitian government, and that the new Haitian police force is free of FRAPH members and will secure Haiti in time. Laborde also

acknowledged that following his arrival in the United States, the political situation in Haiti changed to such an extent that the leader of FRAPH, Emmanuel Constant, fled Haiti and is now living in the United States. Haiti has asked the United States to extradite Constant. Moreover, Laborde acknowledged that no member of FRAPH, including Constant, has attempted to contact him in the United States.

The evidence established that members of FRAPH frequently used violence against those who refused to join their ranks. However, it also established that FRAPH's power is on the decline. Indeed, evidence at the hearing established that since Laborde entered the United States in late 1993, major improvements in Haiti's political stability have occurred. Aristide has since returned to power, and the United States and multi-national forces sent troops to Haiti to ensure its political stability. Indeed, Laborde admitted at the hearing that the climate in Haiti is now such that a person could report persecution to the authorities.

After considering all of the evidence, the IJ denied Laborde's application for asylum and withholding of deportation, and ordered Laborde excluded and deported. The IJ found that Laborde did not suffer past persecution and does not have a well-founded fear of future persecution upon deportation on account of any statutory ground. Notably, the IJ found that there was insufficient evidence in the record to conclude that FRAPH's actions toward Laborde after he contributed $30 to FRAPH were motivated by a perception that he was a political opponent, rather than simply an unwilling recruit.

Laborde appealed the IJ's decision to the Board, which dismissed his appeal as being without merit. The Board denied

Laborde's asylum and withholding of deportation claims premised on his allegations of past persecution on account of his political opinions on the twin grounds that FRAPH's actions toward Laborde did not rise to the level of persecution and that Laborde failed to prove that FRAPH took any action against him on account of his political opinions. The Board denied Laborde's claims premised on his alleged fear of future persecution on account of his political opinions on the twin grounds that Laborde did not prove that FRAPH would seek to persecute him on account of his political opinions and that since FRAPH's power had so declined since Laborde left Haiti, his fear did not have a basis in reality. The Board disposed of Laborde's claims of asylum and withholding of deportation based on his alleged membership in various social groups without determining whether these alleged social groups constitute "social groups" as contemplated by the Act. The Board disposed of these claims on the basis that FRAPH's power has so largely waned since Laborde left Haiti and Aristide returned to power that Laborde did not have a well founded fear of persecution by FRAPH upon his return to Haiti. Laborde noted a timely appeal of the Board's final order to this court.

II.

The Act currently provides two means by which an otherwise deportable alien claiming that he will be persecuted if returned to his country of origin may avoid deportation. The first is found in § 208(a) of the Act, 8 U.S.C.A. § 1158(a) (West Supp. 1998). Pursuant to that section, an alien may apply for asylum. Section 208(b)(1) of the Act, 8 U.S.C.A. § 1158(b)(1) (West Supp. 1998), authorizes the Attorney General of the United States, in her discretion, to confer asylum on an alien who has properly applied for asylum if the Attorney General

"determines that such alien is a refugee" as defined by the Act. *Id.* The Act defines the term "refugee," in pertinent part, as any person unwilling or unable to return to his native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." 8 U.S.C.A. § 1101 (a)(42)(A) (West Supp. 1998). The reasonable person test is the standard for proving a well-founded fear of persecution. *See M.A. v. INS,* 899 F.2d 304, 311 (4th Cir. 1990) *(en banc).* We have held that "[a]n individual seeking asylum under this standard must show (1) that a reasonable person in the circumstances would fear persecution; and (2) that the fear has some basis in the reality of the circumstances and is validated with specific, concrete facts." *Huaman-Cornelio v. Board of Immigration Appeals,* 979 F.2d 995, 999 (4th Cir. 1992) (internal quotation marks omitted).

The second means by which an otherwise deportable alien claiming that he will be persecuted if returned to his country of origin may avoid deportation is found at § 241(b)(3) of the Act, 8 U.S.C.A. § 1231(b)(3) (West Supp. 1998). Prior to Congress' enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L No. 104-208, 1996 U.S.C.C.A.N. (110 Stat.) 1570-1861, on September 30, 1996, the substance of this section was found at § 243(h) of the Act, 8 U.S.C. § 1253(h).[4] Section 243(h), commonly referred to as the withholding of deportation provision, provided, in pertinent part, that "[t]he Attorney

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4. Because Laborde was in exclusion proceedings prior to April 1, 1997, the effective date of the IIRIRA, we apply the preamendment version of the Act's withholding of deportation provision. See IIRIRA, § 309(a),(c)(1), Pub. L No. 104-208, 1996 U.S.C.C.A.N. (110 Stat.) 1697-98.

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General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C.A. § 1253(h) (West Supp. 1996). To qualify for withholding of deportation under this provision, an applicant must demonstrate a " 'clear probability of persecution' " on account of one of the enumerated factors. *INS v. Cardoza-Fonseca,* 480 U.S. 421, 430 (1987). This standard is more stringent than the standard for granting asylum. *See id.* at 431-32. Thus, if an alien is unable to meet the less stringent asylum standard, he or she will be unable to meet the more difficult standard for withholding of deportation. *See Huaman-Cornelio,* 979 F.2d at 1000.

III.

On appeal before us, Laborde continues to press his asylum and withholding of deportation claims alleging past political persecution at the hands of FRAPH and a well-founded fear of political persecution if he is returned to Haiti. In this regard, he first argues that the Board ignored evidence that FRAPH must have imputed a pro-Aristide political opinion to him on account of his being an educated young man working and living in pro-Aristide neighborhoods, who refused to join FRAPH. Assuming that we agree with his first argument, Laborde argues that the Board ignored evidence that FRAPH is not yet under control, and thus presents a serious threat to him if he is returned to Haiti.[5]

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5. Because Laborde failed to brief or argue whether he should prevail on his claims for asylum and withholding of deportation premised

(Cont'd)

Appendix A

We must uphold the Board's dismissal of Laborde's appeal of the IJ's order denying him asylum and withholding of deportation and ordering him excluded and deported if it is supported by "reasonable, substantial, and probative evidence on the record considered as a whole . . . ." 8 U.S C.A. § 1105a(a)(4) (West Supp. 1998).[6] In particular, we cannot reverse the Board's determination that Laborde is not entitled to political asylum unless we conclude that the evidence presented by Laborde "was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Elias-Zacarias,* 502 U.S. at 483-84.

We conclude that the evidence presented by Laborde was not so compelling that a reasonable fact finder could fail to

(Cont'd)
upon his membership in the various individual social groups that he identified, we consider Laborde to have abandoned those claims. *See 11126 Baltimore Blvd. v. Prince George's County, Md.,* 58 F.3d 988, 993 n.7 (4th Cir. 1995) (relying on Federal Rule of Appellate Procedure 28(a)(6) and holding that issues not briefed or argued in federal appeal are deemed abandoned). Accordingly, we do not address those claims. Furthermore, we do not address Laborde's claims, not previously raised below, that lie is entitled to asylum and withholding of deportation on account of his membership in the social group he identifies as draft age men. Having failed to exhaust his administrative remedies with respect to these clainis, we lack subject matter jurisdiction to consider them. *See Farrokhi v. INS,* 900 F.2d 697, 700 (4th Cir. 1990).

6. Section 306(b) of the IIRIRA, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. (110 Stat.) 1668, repealed 8 U.S.C. § 1105a(a)(4) and replaced it with 8 U.S.C. § 1252(b)(4). However, because the Board issued its final order of exclusion with respect to Laborde after October 30, 1996, the transitional rules contained in the IIRIRA provide for judicial review pursuant to 8 U.S.C. § 1105a(a)(4) as that section existed prior to the enactment of the IIRIRA on September 30, 1996. *See* IIRIRA, § 309(c)(4), Pub. L. No. 104-208, 1996 U.S.C.C.A.N. (110 Stat.) 1699.

find the requisite fear of persecution. Laborde's proof is particularly lacking of probative evidence that FRAPH sought to persecute him on account of his political opinions prior to his fleeing Haiti or that it would seek to persecute, him on account of his political opinions if he returned to Haiti. First, Laborde admits that neither he nor his family was politically active in Haiti. Second, there is no evidence to suggest that Laborde's family has become politically active since Laborde entered the United States. Third, there is no evidence that FRAPH knew that Laborde had voted for Aristide in the 1990 presidential election. Fourth and finally, a person's resistance to forced recruitment by a politically motivated organization, without more, does not compel the conclusion that any subsequent adverse actions taken against the person by that organization were taken on account of that person's political opinions. *See INS v. Elias-Zacarias*, 502 U.S. 478, 482-485 (1992).

The facts of *Elias-Zacarias* are strikingly similar to the present case. In *Elias-Zacarias*, Jario Jonathan Elias-Zacarias, a native of Guatemala, applied for asylum and withholding of deportation. *See id.* at 479. He claimed to have suffered persecution and to have a wellfounded fear of persecution on account of his political opinions based on his refusal to join an anti-government guerrilla organization that attempted to recruit him. *Id.* at 479-80. As with Laborde, the members of the organization attempted to recruit Elias-Zacarias during an unannounced face-to-face visit. *Id.* at 479. Like Laborde, Elias-Zacarias refused the organization's recruitment efforts without explanation. *Id.* Afraid that the guerrillas would return, Elias-Zacarias fled Guatemala and illegally entered the United States. *Id.* at 480.

Appendix A

The IJ denied Elias-Zacarias' application on the basis that EliasZacarias failed to demonstrate persecution or a well-founded fear of persecution on account of any of the statutorily enumerated grounds. *Id.* at 480. The Board agreed, but the Ninth Circuit reversed. *See INS v. Elias-Zacarias*, 921 F.2d 844 (9th Cir. 1990). The Ninth Circuit held that an anti-govcrnment guerrilla organization's attempt to conscript a person into its military forces necessarily constitutes persecution on account of political opinion, because "the person resisting forced recruitment is expressing a political opinion hostile to the persccutor and because the persecutor's motive in carrying out the kidnaping is political." *Id.* at 850.

The Supreme Court reversed the Ninth Circuit. The Court rejected as untrue the premise that a person resisting forced recruitment is necessarily expressing a political opinion hostile to the persecutor. *See Elias-Zacarias*, 502 U.S. at 481-82. The Court noted that "[e]ven a person who supports a guerrilla movement might resist recruitment for a variety of reasons — fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few." *Id.* at 482. The Court rejected as irrelevant the fact that a persecutor's general motive in carrying out forced recruitment efforts is political. *Id.* at 481-82. The Court stressed that eligibility for asylum and withholding of deportation turns on whether the persecution is "on account of the *victim's* political opinion, not the persecutor's." *Id.* at 482.

Applying these precepts to the facts before it, the Court held that the Board's determination that Elias-Zacarias failed to establish his eligibility for asylum should have been upheld in all respects. In this regard, the Court concluded that Elias-Zacarias' evidence on the issue of whether the

anti-government guerrilla organization sought to persecute him on account of his political opinions was not "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Id.* at 483-84.

Laborde contends that his case is distinguishable from *Elias-Zacarias*, pointing to evidence that he contends establishes that FRAPH imputed pro-Aristide political opinions to him on account of his being an educated young man who worked and lived in neighborhoods known for loyalty to President Aristide. Laborde first points to the following statements by William G. O'Neil, a consultant to the National Coalition for Haitian Refugees and to the United Nations/ Organization Of American States International Civilian Mission to Haiti, made in an affidavit dated January 9, 1995:

> FRAPH conducted a campaign of terror, especially in neighborhoods known for their loyalty to [Aristide] like Carrefour-Feuilles and its environs where Mr. Laborde lived and the Quartier Bolosse where he worked. These neighborhoods were especially targeted by the military and FRAPH; men of Mr. Laborde's age group were particularly at risk since they were viewed as prime Aristide supporters.

(A.R. at 262). Laborde also relies on a portion of an August 1993 report prepared by the United States Department of Justice that can reasonably be construed as stating that students of Laborde's education level were generally considered by the military government in power at the time to be pro-Aristide. The report also stated that the military targeted student leaders and student organizations for particularly fierce treatment and recognized that massive political violence had been deployed

against children and young adolescents in retribution for participation in social movements.

We cannot reverse the Board unless the evidence cited by Laborde is such that no reasonable fact finder could fail to find that FRAPH imputed pro-Aristide political opinions to Laborde, and sought to persecute him on account of those political opinions. *See Elias-Zacarias,* 502 U.S. at 483-84. The evidence cited by Laborde is simply too general to compel such a finding in light of the undisputed evidence in the record that FRAPH sought to recruit Laborde during its initial organization. In the absence of evidence that FRAPH sought to swell its ranks solely with pro-Aristide recruits, the Board drew a permissible inference that FRAPH conducted recruitment efforts without regard to the actual political opinions of a potential individual recruit. For the same reason, the evidence does not compel a finding that FRAPH's subsequent actions with respect to Laborde were on account of Laborde's political opinions rather than simply his unwillingness to join FRAPH.

Because Laborde's second argument that the Board ignored evidence that FRAPH is not yet under control depends upon its agreeing with his first argument, we need not address this second argument. Furthermore, the Board's determination that Laborde did not meet the asylum standard "necessarily means" that he "did not meet his burden on the more difficult withholding of deportation claim." *Huaman-Cornelio,* 979 F.2d at 1000.

Appendix A

IV.

For the foregoing reasons, we deny Laborde's petition for review and affirm the Board's order.[7]

PETITION FOR REVIEW
DENIED AND ORDER OF
BOARD AFFIRMED

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7. We note that Laborde may be eligible for a deferral of his deportation until December 23, 1998 pursuant to a presidential directive signed by President William J. Clinton on December 23, 1997. The subject of the memorandum containing the directive is "Measures Regarding Certain Haitians in the United States."

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS, DATED NOVEMBER 18, 1996

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A72 848 808 - Washington, DC Date: Nov. 18 1996

In re: GUEHENNO *LABORDE*

IN EXCLUSION PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT:

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ON BEHALF OF SERVICE:

Deborah K. Todd
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Appendix B

EXCLUDABLE:

Sec. 21-2(a)(6)(C)(i), I&N Act, [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of material fact

Sec. 212(a)(7)(A), I&N Act, [8 U.S.C. § 1.1-82(a)(7)(A)] - No valid immigrant visa

APPLICATION: Asylum; withholding of exclusion and deportation

I. PROCEDURAL HISTORY

The applicant is a 26-year-old native and citizen of Haiti. On December 30, 1993, the Immigration and Naturalization Service placed him in exclusion proceedings under section 212(a)(6)(C)(i), of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(C)(i) (1994), as someone who sought to procure entry into the United States by fraud or willful misrepresentation of material fact, and under section 212(a)(7)(A)(i)(1) of Act, 8 U. S. C. § 118 2 (a) (7) (A) (i) (1994), as someone who did not have a valid immigrant visa (Exh. 1).

The applicant admitted the factual allegations made by the Service and sought asylum and withholding of deportation (Tr. a t 7- 9). A hearing on the application was held, and, after taking the case under advisement and reviewing the extenstive documentation, the Immigration Judge issued a decision in which she found the applicant excludable, denied his applications for asylum and withholding, and ordered him excluded and deported. The applicant appeals the denial of his

applications for asylum and withholding of deportation. The appeal will be dismissed. The request for oral argument before the Board is denied. *See* 8 C.F.R § 3.1(e) (1996).

II. EVIDENCE

The applicant testified that in 1993 he had completed 12 years of schooling in Haiti and was studying at home in Port-au-Prince to prepare for additional academic work. He was also managing a grocery store for his aunt, with whom he lived (Tr. at 28-31). At that time an organization known as the Front for the Advancement and Progress of Haiti (FRAPH) was committing murders, and other crimes in Haiti (Tr. at 31-32).

In September 1993 FRAPH sent the applicant and other young people in the neighborhood a letter stating that they intended to establish a local office and that they wanted the support of the neighborhood's youth. The applicant testified that he became afraid when he received the letter, because he did not support FRAPH (Tr. at 34-35). About 2 weeks after he received the letter, FRAPH members visited him at his aunt's store. They identified themselves, asked if he had received their letter, and stated that they had come for his answer to their invitation. He responded by placing $30 in an envelope and handing it to them (Tr. at 37-38). The applicant stated that a donation of money is an indication that one does not want to belong to the group. It was common knowledge that if FRAPH members asked you to join them and you did not wish to do so, you could give them money and they would leave you alone for a while (Tr. at 59-60).

The applicant went to a party that night with his cousin. The next day his aunt told him that two people had come at 10

p.m. while he was at the party. They asked for the applicant but did not identify themselves. The applicant testified that he became very frightened: "In Haiti when someone comes to the house and refuse to identify himself, you know already it's not a good visit" (Tr. at 39). He removed his possessions from the house and hid. The next night the people returned at 11 p.m. When his aunt told them that the applicant no longer lived there, they replied that they would find him. The applicant testified that he remained in hiding from that moment until he left Haiti (*Id.*).

The applicant testified that while in hiding he moved from house to house, never staying in one house too long. He was not able to leave any house during the day, and therefore he could not work or attend church (Tr. at 39-42). He had been in hiding for approximately 3 months when he heard that FRAPH had killed many people in another neighborhood. Fearing that he would be among FRAPH's victims, he learned from his family that they wanted to arrange for him to leave the country. Since he did not want to run the risk of applying personally for an exit visa, the family arranged for an illegal departure. He felt that it had become a matter of life or death for him (Tr. at 42-43).

He left Haiti shortly thereafter, travelling to Miami with a false passport. He learned from his family that FRAPH members had searched for him both in Port-au-Prince and in the village where his father lived. They came to his father's house at midnight, and when he opened the door, they pushed the applicant's father and sister around and ransacked the house (Tr. at 45-46). The applicant testified that he spoke recently with his father. His father said that FRAPH members no longer boast openly of their murders, but they continue to cause chaos

in the country (Tr. at 47-48). The applicant also testified that in a letter dated March 10, 1995, his father said that Haiti was not secure enough for the applicant to return (Tr. at 49-50).

The applicant testified that he voted for President Aristide. He had never travelled outside Haiti before coming to the United States. He stated that he has nothing to fear from legitimate Haitian authorities, and that he does not know if his parents have reported his problems with FRAPH to the restored government (Tr. at 58-60).

The applicant testified that he wants to return to Haiti someday, but he is afraid to do so now. Some of his friends have visited Haiti, but have returned to the United States because of the situation there. If he were forced to return he would again go into hiding (Tr. at 52-53). He thinks that in view of his donation of money and his subsequent disappearance, the FRAPH members would view him as pro-Aristide and anti-FRAPH (Tr. at 63-64).

In addition to his Request for Asylum in the United States (Form I-589) (Exh. 2), the applicant submitted extensive documentation in support of his claim (Exh. 4). Included in this exhibit were an affidavit by the applicant (Exh. 4-A) and an affidavit by William G. O'Neill, a consultant to the National Coalition for Haitian Refugees, prepared after reviewing the applicant's asylum application and supporting documentation (Exh. 4-B). Also included were articles and background information on country conditions in Haiti (Exh. 4-C-1 through 4-C-44). The record also contains a copy of an August 31, 1994, report on the applicant's asylum claim prepared by the Bureau of Human Rights and Humanitarian Affairs, U.S. Department of State (Exh. 3).

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III. DECISION OF IMMIGRATION JUDGE

In her decision, the Immigration Judge concluded that the applicant had not established past persecution in Haiti or a well-founded fear of future persecution if he were to return there. Concerning past persecution, she found that the applicant had not shown that he had suffered harm at the hands of any person or group in particular (I.J. at 6). She also did not accept the applicant's conclusion that by providing financial support to members of FRAPH he was signifying his opposition to the group. Likewise, she was not convinced that FRAPH members were looking for the applicant on this account, or that they had harmed, his father and sister because of this perceived opposition. Therefore, she did not conclude that he had a reasonable basis for fearing persecution from them in the future (Tr. at 6, 8-9).

The Immigration Judge acknowledged that there is instability and some continuing violence in Haiti, but concluded that these conditions were not enough to permit a finding that the applicant's stated fear is well-founded. The Haitian government is willing to control the destabilizing forces, and the fact that violence could not be totally eliminated did not mean that the Haitian government was unable to control the country. Noting that terrorist acts occur in this country as well, and acknowledging that Haiti had a long way to go in establishing an effective system for law and justice, the Immigration Judge nevertheless concluded that the Haitian government was taking action when criminal acts were reported to them (I.J. at 6-7).

Emphasizing that there was no longer any complicity between the Haitian government and the members of FRAPH,

the Immigration Judge concluded that this change removed the primary basis for the applicant's contention that he fears persecution if he returns to Haiti. Therefore, even if she were to conclude that the applicant had suffered persecution in the past, he would not be entitled to a discretionary grant of asylum because of these changed country conditions. Concluding that the applicant had failed to establish a well-founded fear of persecution, she also found that he had not established a clear probability of persecution. Accordingly, she denied his applications for asylum and withholding of deportation and ordered him excluded and deported (I.J. at 9).

IV. ARGUMENTS ON APPEAL

On appeal the applicant argues that the evidence establishes that he suffered past persecution by FRAPH and has a well-founded fear of future persecution by them. He contends that his testimony and affidavit establish that his fear is subjectively genuine. He also asserts that the Immigration Judge failed to consider the affidavits and additional evidence that he submitted.

His refusal to join FRAPH was politically motivated, he asserts, and FRAPH's actions in pursuing him and punishing his family proves that they perceived it as such. He also argues that he fears persecution by FRAPH on account of his membership in three particular social groups: 1) people who refused to join FRAPH; 2) educated young men from poor neighborhoods who support Aristide; 3) returning Haitians. In making these arguments he asserts that the restored government of President Aristide is unable to protect him from persecution by FRAPH members.

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The applicant also argues that the Immigration Judge's decision evidences bias against his claim. Noting that the Service presented no witnesses and introduced no evidence other than that developed on cross examination, the applicant argues that his unrebutted evidence establishes his eligibility for asylum and for withholding of deportation.

V. ANALYSIS

A. *Requirement for asylum and withholding of deportation*

The applicant bears the burden of proof in his application for withholding of deportation under section 243(h) or asylum under section 208 of the Act. *Matter of Acosta*, 19 I&N Dec. 213 (BIA 1985), *overruled on other grounds*, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); 8 C.F.R. § 208.13 (1995).

To be eligible for withholding of deportation pursuant to section 243(h) of the Act, 8 U.S.C. § 1253(h) (1994), the applicant must show a clear probability of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *INS v. Stevic*, 467 U.S. 407 (1984). This means that his facts must establish that it is more likely than not he would be subject to persecution for one of the grounds specified. *Id.*

To be eligible for asylum under section 208 of the Act, he must meet the definition of a "refugee," which requires him to show persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Sections 101(a)(42)(A), 208(a) of the Act, 8 U.S.C. §§ 1301(a)(42)(A), 3.158(a) (1994).

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The burden of proof required to establish eligibility for asylum is lower than that required for withholding of deportation. *INS v. Cardona-Fonseca*, 480 U.S. 421 (1987). An applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution for one of the five grounds specified in the Act. *Matter of Mogharrabi, supra.*

The applicant may also establish statutory eligibility for asylum by demonstrating that he was persecuted in the past on account of political opinion or any of the other grounds enumerated in the Act for which asylum may be granted. *Matter of Chen*, Interim Decision 3104 (BIA 1989).

B. *Forced recruitment by FRAPH as past persecution*

It is well settled that neither forced recruitment nor the threat of reprisals for resisting such recruitment constitutes persecution on account of political opinion. *INS v Elias-Zacarias*, 502 U.S. 478 (1992); *Matter of R-O-*, Interim Decision 3170 (BIA 1992); *Matter of Virgil*, 19 I&N Dec. 572 (BIA 1988). The applicant must show that in seeking to recruit him into their ranks or to punish him for his refusal to join, FRAPH did so because of his political opinion, and not simply because of a desire to increase their membership or to intimidate others into joining.

The applicant failed to show that FRAPH's initial recruiting efforts were motivated by his manifested political opinion or by an opinion that they imputed to him. He stated he was approached by FRAPH in September or October 1993. Evidence shows that this was at the time that FRAPH was first organized in Haiti (Tr. at 34; Applicant's affidavit, Ex. 4-A, at paras. 6,

10; O'Neill affidavit, Exh. 4-B, at para. 5). He was one of many in his neighborhood who were recruited by FRAPH, which wanted the support of the local youth (Tr. at 35). While he testified that he was popular and well-known from his work in the store, he did not establish that FRAPH's initial overtures toward him were any different from those made toward others in his neighborhood. Nor did he present evidence that FRAPH was aware of his political opinion (except that he lived in a pro-Aristide neighborhood) or that FRAPH recruiters alluded to politics in their initial attempt to enlist him. Rather, evidence indicates that FRAPH generally focused on more mundane benefits — money, protection, neighborhood power — in seeking recruits (O'Neill affidavit, Exh. 4-B, at para. 7).

There is also insufficient evidence in the record to conclude that FRAPH's subsequent actions toward the applicant were motivated by a perception that he was a political opponent rather than simply an unwilling recruit. The applicant argues that his comparatively large cash contribution of $30 branded him as anti-FRAPH and pro-Aristide (Applicant's affidavit, Exh. 4-A, at. paras. 20-21; Tr. at 63-64). He argues that with FRAPH one was an ally or an enemy (O'Neill affidavit, Exh. 4-13, at para. 7). Although we acknowledge that his disappearance may well have conveyed to FRAPH that the applicant was unwilling to enlist, that acknowledgement still does not establish that FRAPH's subsequent behavior toward him was motivated by a perception that he was a political opponent. As the O'Neill affidavit indicates, FRAPH threatened and employed violence against those who refused to join (Exh. 4-13 at para. 8) The attack on the applicant's father's home may have been in response to the applicant's disappearance and apparent refusal to join FRAPH. Even so, there is no evidence that FRAPH's actions toward the applicant's family were motivated by

anything other than a desire to coerce him into joining their organization.

On appeal the respondent cites *Arteaga v. INS*, 836 F.2d 1233 (9th Cir. 1988), a case in which guerrillas attempted to recruit an individual, warning that they would return if he did not join. The court in that case held that forced recruitment was tantamount to kidnapping, and hence persecution. However, in light of the Supreme Court's subsequent decision in *INS v. Elias-Zacarias*, *supra*, we conclude that the court's holding in *Arteaga v. INS*, *supra*, has been effectively overruled.

We do not discount FRAPH's record of violence or the harm that it inflicted on many citizens in Haiti. However, FRAPH's actions toward the applicant did not rise to the level that could be considered persecution. Additionally, on the evidence presented in this case, we cannot conclude that FRAPH's overtures toward the applicant and their actions against his family were motivated by their perception that he was a political enemy. Therefore, their recruitment efforts did not constitute persecution on account of his pro-Aristide political opinion.

C. *Well-founded fear of future persecution by FRAPH*

The applicant argues that he has a well-founded fear of persecution by FRAPH both as an Aristide supporter and as a returning Haitian. He argues that FRAPH still operates in Haiti, despite the return to office of President Aristide, and he cites considerable documentary evidence of continuing violence in the country. Although we acknowledge that conditions in Haiti are subject to conflicting forces, we believe that there has been significant progress in human rights since the multi-national

intervention that returned President Aristide. That record of improvement, combined with the applicant's lack of prior political activity, makes it unlikely that he would be in peril from anti-Aristide forces if he were to return to Haiti. Therefore, although the applicant may have a genuine subjective fear, we do not find that in his case it is well founded in light of conditions in Haiti today.

The record contains a copy of the Department of State's report on human rights practices in Haiti for 1994 (Exh. 4-12). Issued in February 1995, the report notes, as do numerous other exhibits in the record, the emergence of FRAPH at the end of 1993 as a destabilizing political force that spread throughout Haiti and infiltrated many of the country's poorer neighborhoods. The report also summarized the actions of the multi-national force that restored President Aristide to office in 1994, and noted that by the end of 1994 a secure and stable environment had been established in Haiti. Paramilitary groups such as FRAPH had been outlawed, and political violence had been drastically reduced. At the same time, however, the report acknowledged that in a number of places people stated they were afraid to resume political activity because of continued activity by FRAPH members.

Other documents in the record also attest to Haiti's progress in restoring democracy, although they too contain reminders that political violence has not been totally eliminated. For example, by April 1995 the situation in Haiti, while hardly perfect, was stable enough to permit the U.S. forces to turn over peacekeeping responsibility to a United Nations security force. (Exhs. 4-9, 4-10). With the help of the international community, Haiti is establishing a new national police force to replace the former corrupt security officials. While that

permanent force is being established, an interim police force has been put in place. However, some observers have criticized the selection and training of members of the interim force. (Exh. 4-11). Also troublesome is the fact that all of the weapons have not been confiscated from former FRAPH members. (Exhs. 4-25; 4-38; 4-39; O'Neill affidavit, Exh. 4-11, at paras. 9-10).

Additional documents describing conditions in Haiti were submitted by the applicant with his appeal. Written after the Immigration Court hearing, these documents offer some more recent information on country conditions. One document entitled *Haiti: Darkness Remains* is an April 1995 report written by the National Coalition for Haitian Refugees (Attachment A). While it criticizes the Department of State report for being overly optimistic in its assessment of conditions in Haiti, this report also acknowledges that conditions in Haiti have improved significantly since the return of President Aristide. It cautions, however, against blanket assumptions that all Haitians can be safely returned and urges that each case be examined carefully in light of its own factual circumstances.

As we examine the factual circumstances of the applicant's case, we conclude that they do not support a well-founded fear of persecution upon his return to Haiti. He was recruited by FRAPH during its initial recruitment period, and there is no evidence in the record to indicate that he was of special interest to them. He presented no evidence of political activity other than voting in the presidential election. Although he fled his home rather than join FRAPH, his donation of funds and the absence of any anti-FRAPH actions on his part lead us to conclude that there would be little if any continuing interest in him by FRAPH partisans after almost 3 years.

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In concluding that the applicant does not have a well-founded fear of persecution by underground FRAPH members upon his return to Haiti we do not mean to minimize the overall difficulties facing the Haitian population as the country emerges from the legacy of oppression by prior regimes. The exhibits submitted by the applicant provide effective documentation of the crime, insecurity and other problems besetting Haiti today. It is possible to find in many of these reports language that would suggest that the overall situation is bleak. At the same time, other passages and other reports could be cited to bolster a conclusion that the prospects are more encouraging. We determine in this case that despite the overall uncertainties in Haiti, the circumstances of the applicant's situation do not permit a conclusion that he has a well-founded fear of persecution by the remnants of FRAPH upon his return. Accordingly, we conclude that he did not establish his eligibility for asylum and for withholding of deportation.

ORDER: The appeal is dismissed.

/s/ [illegible]

FOR THE BOARD

APPENDIX C — MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE IMMIGRATION JUDGE DATED MAY 8, 1995

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
901 N. STUART ST., SUITE 708
ARLINGTON, VA 22203
SITTING AT ARLINGTON, VIRGINIA

FILE: A 72-848-808 — IN EXCLUSION PROCEEDINGS
IN THE MATTER OF: — PURSUANT TO 8 U.S.C. 1100 et. seq. (The Immigration and Nationality Act)

LABORDE, GUEHENNO
RESPONDENT/APPLICANT

MEMORANDUM OF DECISION AND ORDER

This memorandum is a summary of the oral decision rendered at ARLINGTON, VIRGINIA. If the decision is appealed, the full text of the decision and order will be transcribed and provided to the parties.

* * *

✓ Applicant has been ordered excluded and deported.

* * *

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✓ The Respondent/Applicant was granted/denied Asylum/ Withholding deportation under Section 208(a)/243(h) of the Act.

* * *

✓ The Service/Respondent/Applicant has/have waived/ reserved appeal. If appeal has been reserved, appeal must be filed by May 18, 1995.

* * *

Date: May 8, 1995

s/ Joan V. Churchill
Immigration Judge
JOAN V. CHURCHILL

AML

Appendix C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Washington, D.C.

File No.: A 72 848 808 May 8, 1995

In the Matter of

GUEHENNO LABORDE,

Applicant

IN EXCLUSION PROCEEDINGS

CHARGES: Section 212 (a) (6) (C) (i) — Seeks to procure entry into the United States by fraud ~~212(a) (7) (A) (i) (I) That's fraud~~ or misrepresentation;

212 (a) (7) (A) (i) (1) — Immigrant-no-valid immigrant visa or other valid travel document.

APPLICATIONS: Asylum/withholding of deportation under Section 243(h).

ON BEHALF OF APPLICANT:

Kathleen M. Cronin, Esquire
Verner, Liipfert, Bernhard,
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ON BEHALF OF SERVICE:

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Suite 500
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Arlington, VA 22203

Appendix C

ORAL DECISION OF THE IMMIGRATION JUDGE

The applicant is a 26-year-old single male, alien, who is a native and citizen of Haiti. He arrived with a false passport on December 29, 1993. As it did not appear that he was clearly admissible to the United States, these proceedings were initiated. He has conceded inadmissibility as charged as one who lacks a valid Immigrant visa or other travel document and who sought to procure entry by fraud. Based on these concessions and the prior finding we find that inadmissibility has been established on this record.

The applicant seeks asylum. By regulation, all applications for asylum are deemed to be applications for withholding of deportation as well, even in exclusion proceedings. 8 C.F.R. 208.3(b).

Section 208 of the Immigration and Nationality Act provides for asylum in the exercise of discretion for persons who fit the definition of refugee. A refugee is defined in the Act as an alien unwilling to return to his or her country of nationality because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. A well-founded fear of persecution is one which a reasonable person would fear in the circumstances, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). A well-founded fear of persecution is something less than a clear probability there of, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). A clear probability of persecution is required to establish eligibility for withholding of deportation, *INS v. Stevic*, 467 U.S. 407 (1984).

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The respondent testified that he stayed with an aunt in Port-au-Prince while he attended school there. He helped out in her small grocery store which was in a slum neighborhood. He managed the grocery store until he had to leave Haiti. He was preparing for the second part of high school, but was not attending school after he obtained a diploma in 1992 from studying electronics. He was visited by persons who belonged to an organization whose initials are FRAPH. Members of the FRAPH sent him a letter with their insignia inviting him to join the organization. Shortly after he received the letter, two members of the FRAPH visited him at the grocery store, presented their FRAPH membership cards to him, and requested his answer. He testified that he went into another room, put some money in an envelope, sealed it, and handed the money to these individuals who then left. The applicant testified that he understood that if you provide money to the FRAPH organization, they will leave you alone for a while. The applicant has a very bad opinion of FRAPH considering that it is a subversive organization that was ruining Haiti, *see* Exhibit 4-A, page 4.

It is the applicant's contention that his donation of money to the organization would be viewed as a sign of opposition by the organization, and that, therefore, he faces retribution in Haiti because of what would be perceived by FRAPH members as opposition to their group. According to the applicant, and some of the background information, the FRAPH organization has not been entirely disbanded. Members of it are continuing to commit violence against others, persons perceived to be opponents. Members of FRAPH are wanted for various kinds of murders. The head of the organization, a Mr. Constant, was able to slip out of Haiti. He is believed to be in the United States.

Thereafter, unknown persons came by asking about him or for him, describing themselves as "authorities." The applicant heard about this through relatives. He concluded that members of FRAPH were looking for him. He became frightened and decided not to return to his aunt's home. He then went "into hiding," changing locations many different times. Family members, through well-placed connections, arranged for him to get a phoney passport and to be transported to the United States. His family had kept in touch with him in the period he was in hiding through strangers who came to the house. He did not go to get his own passports instead he was provided a fake-passport that contained his photograph.

The applicant claims that he has heard from others and in talking to his father, that after the applicant was in the United States, members of FRAPH went to his father's house and ransacked it. His family lives in a rural area, a considerable distance from Port-au-Prince called Las Illes. According to the applicant, he heard that they beat his father and 19-year-old sister and took whatever they wanted from the house, *see* Group Exhibit 4-A at page 14. The applicant claims to have a letter from his father describing these events. The applicant has not had the letter interpreted into English however, notwithstanding that, this case was continued for several weeks.

The applicant claims that he has friends who have visited Haiti to see if they could return there to live, but who have returned here reporting that the situation is not quite secure. He does not want to return to Haiti now, because it is not secure. He is afraid that if he returned, he would have to return to a hiding type situation which he left when he came here.

The applicant is aware that Constant himself, the head of FRAPH, came to the United States last year, and he knows that

the government of Haiti has asked the United States to return Constant to extradite him back to Haiti. He is also aware that the climate is such now in Haiti that one can report persecution to the authorities. He is aware that Mr. Constant faces pending murder charges. The applicant fears nothing from the authorities in Haiti. now that Aristide is back. He continues to fear members of FRAPH because the current police force in Haiti cannot control FRAPH.

It is contended that the applicant faces both past persecution and a well-founded basis to fear persecution in the future. The past persecution alleged is the perceived threats from members of FRAPH, as well as the fact that the applicant spent some time in hiding which is considered by him, it is argued, a form of persecution. He claims to fear persecution in the future because of the continuing instability, the inability to control FRAPH members. He is concerned that there will be violence connected with the upcoming election scheduled for June, and the fact that security measures have been turned over to an international force and are no longer being handled under U.S. command.

It is our conclusion that the applicant has not established that he has faced persecution in the past, or that he has a well-founded basis to fear persecution in the future. We do not accept the applicant's conclusion that his providing financial support to members of FRAPH in any way indicated or constituted a sign of opposition to that group for which he has a reasonable basis to fear persecution or retribution in the future. His argument that the time he spent in hiding constitutes past persecution of him is not logical. The applicant has not described any incidents that have involved harm that has been caused to him by anyone in particular

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The applicant claims that his father and sister were harmed. The information on that is sketchy. The applicant has not even had the letter, in which it is described, interpreted so that it could be presented into evidence. In any event, the testimony regarding this is entirely self-serving and the contents of the letter regarding it would not be particularly reliable even if such letter were interpreted and presented into evidence.

The fact that there is instability in the country of Haiti and continuing criminal violence which has not been brought completely under control in the few months that the U.S. and international forces have been assisting with the maintenance of order in Haiti, does not constitute a well-founded basis to fear persecution. The government of Haiti, as the applicant acknowledges, is presently willing to control the forces whom he fears. The question is whether the authorities are able to control this violence.

Normally persecution must be at the hands of the governmental ~~of~~ authorities. The concept has been extended to cover harm from an organized group which the government is unable or unwilling to control, *McMullen v. INS*, 658 F.2d. 1312 (9th Cir. 1981). In this case, as we just mentioned, it is clear that the government of Haiti is not unwilling to control the violence. The argument is that the government and even the U.N. forces are unable to. The fact that violence cannot be completely controlled does not establish that the authorities are "unable to control." Terrorist or criminal acts can occur under, any system of government. We have, unfortunately, in this country experienced a most terrible criminal and terrorist act within the last couple weeks, the bombing of a federal building in Oklahoma. The authorities in Haiti are taking action, however, at this time when criminal acts are reported to them.

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The applicant testified that one can now report acts of persecution to the police authorities. The background information indicates that Haiti has a long way to go, as was expected, in having an effective system for law and order and justice. At present the international community, through the U.N., United Nations forces, is shouldering much of the responsibility.

The applicant fears returning to either Port-au-Prince or Las Illes, because, he testified, his face is well known in Port-au-Prince and FRAPH members have a strength in Las Illes, the rural area ~~that~~ from which his family comes. ~~from.~~

As we have stated, we are not convinced that members of FRAPH perceive the applicant as an opponent and would wish to harm him. We are not convinced from his testimony that members of FRAPH have been looking for him to harm him or have caused harm to his father and sister because of the applicant's perceived opposition to FRAPH. Therefore, we are not convinced that a return to Haiti, to either Port-au-Prince or Las Illes would result in him being the object of retribution by members of FRAPH.

In any event, we are not convinced that there is not a place where the applicant could go where he would experience relative safety. The fact that there is continuing criminal violence in Haiti does not establish that any danger that the applicant may face there is necessarily on account of his political opinion or would be in any way in connection with his political opinion. The applicant favors Aristide. Aristide has been restored to power in Haiti. The majority of the country appears to favor the restoration of Aristide. The fact that there are some members of the population who continue to engage

in criminal behavior does, not establish that those persons can be considered persecutors on account of other people's political opinions. We are not convinced that the attack on the applicant's family had any relationship to him, assuming that it did occur. There appears to be a lot of robbery going on in Haiti. Other criminal acts described in the background material include a recent murder of an Aristide opponent, a person who was rather prominent.

There has been a significant change in the conditions of the government of the applicant's country since he departed. Even if we were convinced that what he describes as past persecution could be so classified, we would not find that, as a matter of discretion, he should be accorded asylum now in the face of changed conditions which have removed the primary basis of his fear, that is government complicity with the actions of the FRAPH members.

The applicant's application is based primarily on assumptions which are entirely unsupported on this record. The primary such assumption is that his donation of money to the FRAPH organization would be viewed as a sign of opposition. Normally a donation of money is viewed as a sign of support and approval. We find the applicant's reliance on this theory to be unreasonable.

Having found that the applicant has not established a well-founded basis to fear persecution in Haiti, it follows that he cannot meet the greater evidentiary burden to establish a clear probability of persecution.

Appendix C

ORDER

IT IS ORDERED that the applicant's applications for asylum and withholding of deportation (exclusion) be, and hereby, denied;

IT IS FURTHER ORDERED that the applicant be excluded and deported from the United States on the charges contained in the charging document.

s/ Joan V. Churchill
JOAN V. CHURCHILL
Immigration Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 6, 1998

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2812
A72-848-808

GUEHENNO LABORDE

Petitioner

v.

U.S. IMMIGRATION & NATURALIZATION SERVICE; UNITED STATES OF AMERICA

Respondents

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The petitioner's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Appendix D

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
DEC 7 1998
CLERK

(2)

No. 98-576

In the Supreme Court of the United States

OCTOBER TERM, 1998

GUEHENNO LABORDE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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15PP

QUESTION PRESENTED

Whether the court of appeals correctly upheld the Board of Immigration Appeals' conclusion that petitioner failed to meet his burden of proving eligibility for asylum and withholding of deportation.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-576

GUEHENNO LABORDE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is unpublished, but the decision is noted at 145 F.3d 1325 (Table). The opinions of the Board of Immigration Appeals (Pet. App. 16a-29a) and the immigration judge (Pet. App. 30a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1998. A petition for rehearing was denied on July 6, 1998 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on October 5, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the court of appeals' denial of his petition for review of a decision of the Board of Immigration Appeals (Board). Pet. App. 1a-15a. The Board dismissed petitioner's appeal from a decision of an immigration judge (IJ) denying his application for asylum and withholding of deportation. *Id.* at 16a-29a.

1. Petitioner, a native and citizen of Haiti, tried to enter the United States using fraudulent documentation. The Immigration and Naturalization Service (INS) apprehended him and charged him with being excludable for (1) fraudulently or willfully misrepresenting a material fact in seeking to procure entry into the United States, in violation of 8 U.S.C. 1182(a)(6)(C)(i) (Supp. IV 1992), and (2) being an immigrant who, at the time of application for admission, was not in possession of a valid unexpired immigrant visa or other valid entry document, and a valid unexpired passport or other travel document, in violation of 8 U.S.C. 1182(a)(7)(A)(i)(I). Pet. App. 2a-3a; Admin. R. 819-820.

After being found excludable, petitioner sought asylum and withholding of deportation. He claimed to have suffered past persecution, and to have a well-founded fear of future persecution, in Haiti on account of his political opinion and membership in various social groups. Pet. App. 3a; Admin. R. 150-152, 708-714. To support his claim, petitioner testified about several incidents that took place during the fall of 1993, while he was living with his aunt in Port-au-Prince and working at her grocery store. According to petitioner, members of the Front for the Advancement of Progress of Haiti (FRAPH) sent letters to many young men in his neighborhood—including him—explaining that it

wanted to create an office in the area and that it sought the support of the youth. Pet. App. 4a; Admin. R. 173, 176, 179-180. Two weeks later, members of FRAPH came to the store, seeking petitioner's response to the letter. Pet. App. 4a-5a; Admin. R. 182-183. Petitioner said he responded by giving the FRAPH members a sealed envelope containing $30; he explained that by giving the men money, he implicitly refused to join FRAPH. Pet. App. 5a; Admin. R. 183, 204-205, 220. The men left the store without opening the envelope and never returned. Admin. R. 183.

The next week, two unidentified men appeared at petitioner's aunt's house on two consecutive evenings looking for him, but he was not home. Pet. App. 5a; Admin. R. 183-184. Petitioner believed the men were members of FRAPH, although he admitted he was not certain. Pet. App. 5a; Admin. R. 184. Fearing what would happen if FRAPH found him, petitioner went into hiding and moved from place to place for three months. Finally, he decided to enter the United States using fraudulent documents. Pet. App. 5a; Admin. R. 184-187. Petitioner also testified that after he left Haiti, FRAPH members went to his parents' residence, asked for him, and then "ransacked" the house. Pet. App. 5a; Admin. R. 190-191. Based on those experiences, petitioner claimed that he suffered past persecution and has a well-founded fear of future persecution on account of his political opinion.

Petitioner filed his asylum application in May 1994, along with hundreds of pages of general documentary evidence regarding the political conditions in Haiti. Admin. R. 708-714, 236-777. Significantly, in his asylum application, petitioner stated that he refused to join FRAPH for religious reasons. *Id.* at 709. He also stated that, while in Haiti, the only politically moti-

vated action he took was to vote for President Aristide; he did not claim that FRAPH members were aware of his vote. Pet. App. 4a; Admin. R. 201. After petitioner left Haiti, President Aristide returned to power. Pet. App. 6a; Admin. R. 168, 217.

2. In May 1995, the IJ denied petitioner's application for relief, concluding that he did not satisfy the statutory requirements for asylum or withholding of deportation. Pet. App. 33a-39a. The IJ ruled that petitioner suffered no past persecution and did not have a well-founded fear of future persecution on account of his political opinion. *Id.* at 36a. The IJ was "not convinced that members of FRAPH perceive [petitioner] as an opponent and would wish to harm him." *Id.* at 38a. The IJ specifically rejected petitioner's assertion that providing financial support to FRAPH indicated opposition to that group. *Id.* at 36a. The IJ also expressed doubt that the attack on petitioner's family had anything to do with him, commenting that robbery is a frequent occurrence in Haiti. *Id.* at 39a. Finally, the IJ noted the significant changes in the government of Haiti since petitioner came to the United States, and concluded that even if petitioner could have shown he suffered past persecution, he was not entitled to asylum in light of Haiti's changed country conditions. *Ibid.*

3. In November 1996, the Board dismissed petitioner's appeal of the IJ's decision, holding that petitioner did not show either past persecution or a well-founded fear of future persecution in Haiti. Pet. App. 24a-29a. The Board applied the holding of *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), that forced recruitment and reprisals for resisting recruitment do not by themselves constitute persecution on account of political opinion. Pet. App. 24a. The Board rejected petitioner's past persecution claim because he did not establish that

either FRAPH's initial recruitment efforts or its subsequent actions were motivated by his political opinion, as distinguished from FRAPH's desire to increase its membership. *Ibid.* The Board found it significant that FRAPH sought to recruit all of the local youth; that petitioner did not allege that the initial overtures that FRAPH made toward him were any different than those made toward other young people; and that petitioner did not claim that FRAPH was aware of his political opinion, except for the fact that he lived in an allegedly pro-Aristide area. *Id.* at 25a.

The Board also held that petitioner did not demonstrate a well-founded fear of future persecution should he return to Haiti. Pet. App. 26a-29a. Much of the evidence indicated significant improvements in human rights conditions in Haiti since multi-national forces secured President Aristide's return to power in 1994. *Id.* at 26a-27a. Although petitioner might have a genuine subjective fear, the Board held that it was not well-founded given the changed conditions in Haiti. *Id.* at 29a. For those reasons, the Board dismissed the appeal.

4. The court of appeals denied petitioner's petition for review in an unpublished order, ruling that the Board's decision was supported by substantial evidence.[1] Pet. App. 10a-11a. Petitioner argued that the Board ignored evidence that FRAPH imputed a pro-Aristide political opinion to him because he was an

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[1] In the court of appeals, petitioner abandoned his claims of persecution based on his membership in the various social groups cited to the Board; he did argue that he feared persecution based on his membership in the "social group" of "draft age men." Pet. App. 10a n.5, 22a. However, because he had not raised that claim before the Board, the court of appeals held that it lacked jurisdiction to consider it. *Id.* at 10a n.5. Only petitioner's claim of persecution on account of political opinion is before this Court.

educated young man working and living in a pro-Aristide neighborhood who refused to join FRAPH. *Id.* at 9a. Therefore, he claimed, he suffered past persecution and has a well-founded fear of future persecution by FRAPH based on his political opinion. *Id.* at 9a-11a. The court of appeals rejected that argument, stating that the record is "particularly lacking of probative evidence that FRAPH sought to persecute him on account of his political opinion prior to his fleeing Haiti or that it would seek to persecute, [*sic*] him on account of his political opinions if he returned to Haiti." *Id.* at 11a. The court pointed to four factors in support of its conclusion: (1) petitioner admitted that neither he nor his family was politically active in Haiti; (2) there was no evidence that his family became politically active after he left; (3) there was no evidence that FRAPH knew that petitioner voted for Aristide in the 1990 presidential election; and (4) his resistance to FRAPH's recruitment efforts did not, without more, compel the conclusion that subsequent adverse actions taken against him were on account of his political opinion. *Ibid.* In the absence of evidence that FRAPH sought to recruit solely Aristide supporters, the court of appeals concluded that the Board drew the permissible inference that FRAPH's recruitment efforts were conducted without regard to petitioner's political opinion. *Id.* at 14a.

5. A petition for rehearing was denied on July 6, 1998. Pet. App. 41a-42a.

ARGUMENT

Petitioner argues that the court of appeals' decision: (1) improperly required him to present direct evidence of FRAPH's motives, contrary to *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992); *Sangha* v. *INS*, 103 F.3d

1482, 1490 (9th Cir. 1997); and *Balasubramanrim* v. *INS*, 143 F.3d 157, 164-165 n.10 (3d Cir. 1998); (2) disregarded record evidence and required him to disprove all adverse inferences that could be drawn; and (3) is inconsistent with international norms, and the United Nations High Commissioner for Refugees, *Handbook on Procedure and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol to the Status of Refugees* (Jan. 1988) (UNHCR *Handbook*). Those contentions are meritless, and the unpublished decision of the court of appeals does not warrant review by this Court.

1. Contrary to petitioner's argument, the Fourth Circuit's decision does not conflict with either *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), or subsequent circuit court decisions.

In *Elias-Zacarias*, the Court considered whether forced conscription into a guerrilla group—or suffering retaliation for resisting recruitment—is sufficient by itself to establish persecution on account of political opinion. The Court concluded that it is not, because "[e]ven a person who supports a guerrilla movement might resist recruitment for a variety of [non-political] reasons." 502 U.S. at 482. The Court ruled that an applicant seeking asylum must show that the guerrilla group is motivated by his political opinion, rather than by a desire to fill its ranks. *Ibid.* Finally, the Court held that although an applicant need not present direct proof of the persecutor's motive, "since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial." *Id.* at 483. Importantly, the Court stressed that Board decisions are entitled to great deference, and that to obtain judicial reversal of a Board decision, an applicant "must show that the evidence he presented was so compelling that no reason-

able factfinder could fail to find the requisite fear of persecution." *Id.* at 483-484.

Consistent with *Elias-Zacarias*, the Fourth Circuit held in this case that it "[could not] reverse the Board unless the evidence cited by [petitioner] is such that no reasonable fact finder could fail to find that FRAPH imputed pro-Aristide political opinions to [petitioner], and sought to persecute him on account of those political opinions." Pet. App. 14a. The court acknowledged that petitioner offered evidence that FRAPH tended to view students of petitioner's education level as Aristide supporters, but ruled that that evidence "is simply too general to compel such a finding [of persecution]." *Id.* at 13a-14a. The court continued: "In the absence of evidence that FRAPH sought to swell its ranks solely with pro-Aristide recruits, the Board drew a permissible inference that FRAPH conducted recruitment efforts without regard to the actual political opinions of a potential individual recruit. For the same reason, the evidence does not compel a finding that FRAPH's subsequent actions with respect to [petitioner] were on account of [his] political opinions rather than simply his unwillingness to join FRAPH." *Id.* at 14a.

Petitioner contends that the court of appeals required him to present "specific and direct evidence of the FRAPH's motivation" (Pet. 13), and that such a requirement conflicts with *Elias-Zacarias*'s holding that either direct or circumstantial evidence is sufficient. 502 U.S. at 483. Specifically, petitioner argues that by asking him to present evidence that FRAPH "sought to swell its ranks *solely* with pro-Aristide recruits," the Fourth Circuit required specific (and, presumably, direct) proof of FRAPH's motives. Pet. 13-14. Petitioner misreads the court of appeals' opinion. The court of appeals was commenting about a lack of

evidence of any sort compelling reversal of the Board when it commented on the "absence of evidence that FRAPH sought to swell its ranks solely with pro-Aristide recruits." Pet. App. 14a. The Fourth Circuit did not hold that petitioner was required to present "direct" evidence of FRAPH's motives for recruiting him in particular. Rather, the court carefully followed the Court's guidance in *Elias-Zacarias* and considered petitioner's circumstantial evidence.

Petitioner complains (Pet. 15) that the Fourth Circuit should have given more weight to third-party reports indicating that FRAPH often imputed pro-Aristide sentiments to people like petitioner, and thus should have inferred that petitioner was forcibly recruited based on that imputed political opinion. However, "petitioner must prove something more than violence plus disparity of views." *Sangha*, 103 F.3d at 1487. And *Elias-Zacarias* makes clear that petitioner must do more than prove that he had a political opinion—he must offer evidence that FRAPH "will persecute him *because* of that political opinion, rather than because of his refusal to fight with them." 502 U.S. at 483.

Furthermore, even if the evidence were adequate to support the conclusion he would draw, petitioner would not be entitled to reversal. Given the applicable deferential standard of review, the evidence must "not only *support[]* that conclusion, but *compel[]* it." *Elias-Zacarias*, 502 U.S. at 481 n.1; see also *id.* at 483-484 (petitioner "must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution."). Here, the court of appeals properly held that the evidence—including the circumstantial evidence—did not compel a finding that FRAPH's recruitment efforts were motivated by petitioner's political opinion rather

than by a general desire to fill its ranks. See *id.* at 483 (finding failure to establish requisite motivation "with the degree of clarity necessary to permit reversal of a [Board] finding to the contrary.").

Petitioner suggests that the decision below conflicts with *Sangha*, *supra*, and *Balasubramanrim*, *supra*. In *Sangha*, the Ninth Circuit held that a finding of political persecution could be justified "when there is no other logical reason for the persecution." 103 F.3d at 1490. Presumably, petitioner believes that there is no logical reason for FRAPH to seek his recruitment other than because of his political opinion. This Court rejected that exact conclusion in *Elias-Zacarias*. See 502 U.S. at 482 (guerrilla groups may forcibly recruit members for the purpose of filling their ranks). The Third Circuit's decision in *Balasubramanrim* likewise does not conflict with the Fourth Circuit's decision in this case. Petitioner relies on a footnote in *Balasubramanrim* stating that "persecution may be on account of a political opinion the applicant actually holds or on account of one the foreign government has imputed to him." Pet. 10 (citing 143 F.3d at 164-165 n.10). But the court in this case did not reject the concept of "imputed" political opinion. Moreover, even the court in *Balasubramanrim* noted that an applicant to whom a political opinion is imputed must show that the group at issue targeted him on account of that imputed opinion. See 143 F.3d at 164-165 n.10.

The court of appeals' decision is consistent with *Elias-Zacarias* and subsequent circuit authority, since it did not exclude circumstantial evidence and it applied the proper, deferential standard of review to the Board's decision. Further review by this Court therefore is unwarranted.

2. Petitioner argues that the court of appeals disregarded record evidence and required him to disprove all adverse inferences that could be drawn. Pet. 13-15. Determining whether petitioner produced sufficient record evidence of FRAPH's motivation involves the sifting and weighing of evidence, and does not present a novel or unsettled question of federal law worthy of this Court's review. In any event, petitioner is mistaken; the court of appeals did consider the third-party reports. See Pet. App. 13a. The Fourth Circuit, moreover, did not require petitioner to disprove all adverse inferences; it merely held that he did not present compelling evidence that would allow it to reverse the "permissible inference" drawn by the Board. *Id.* at 14a.

3. According to petitioner, the court of appeals' supposed requirements that "all inferences must be drawn against the applicant," and that he must produce "direct evidence" to satisfy his burden, conflict with "the international norms as expressed by the UNHCR" *Handbook*. Pet. 16, 17. Petitioner's argument fails on several grounds. First, as explained above, the court of appeals did not create a "requirement of direct evidence." Pet. 17. Also, the court did not hold that all inferences must be drawn against the applicant. Instead, the court simply held that petitioner failed to offer evidence that would suffice to compel a reversal of either the Board's inferences or its ultimate conclusion.

The court of appeals is not bound by the UNHCR *Handbook* in any event. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) ("We do not suggest, of course, that the explanation in the U.N. Handbook has the force of law or in any way binds the INS with reference to the asylum provisions of § 208(a). Indeed, the *Handbook* itself disclaims such force, explaining that 'the determination of refugee status under the

1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.'"). Here, the court of appeals properly relied on the holding of *Elias-Zacarias*, 502 U.S. at 482-483, that an alien must demonstrate that the persecution he faced was on account of his political opinion, rather than on account of a guerrilla group's general desire to fill its ranks. Pet. App. 11a-14a. To the extent the UNHCR *Handbook* contradicts that holding, it must be disregarded. See *Cardoza-Fonseca*, 480 U.S. at 439 n.22.[2]

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[2] As the court of appeals noted in its decision, petitioner is a beneficiary of the directive signed by President Clinton on December 23, 1997, deferring for one year the enforced departure of certain Haitians who were paroled into the United States or applied for asylum in the United States prior to December 31, 1995. Pet. App. 15a n.7. Also, on October 21, 1998, President Clinton signed into law the Omnibus Budget Bill, Pub. L. No. 105-277. See 144 Cong. Rec. H11,044, H11,190 (daily ed. Oct. 19, 1998). Title IX, 144 Cong. Rec. H11,190-H11,191, entitled "The Haitian Refugee Immigration Fairness Act of 1998" (HRIFA), establishes procedures for granting amnesty to certain Haitians who can prove, *inter alia*, that they are otherwise admissible to the United States. The new law grants an exception from several grounds of inadmissibility, including one that is applicable to petitioner, Immigration and Nationality Act (INA), § 212(a)(7)(A), 8 U.S.C. 1182(a)(7)(A). 144 Cong. Rec. H11,044, H11,190. Petitioner does not appear to be eligible for HRIFA relief, however, because he is also inadmissible under INA § 212(a)(6)(C)(i), 8 U.S.C. 1182(a)(6)(c)(i) (Supp. IV 1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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